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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/533,615	08/01/2005	R. Charles Murray	PPT-13202/08	1756
25006 7590 05/13/2009 GIFTORD, KRASS, SPRINKLE, ANDERSON & CITKOWSKI, P.C PO BOX 7021 TROY, MI 48007-7021				
EXAMINER				
SALMON, DEVIN RAE				
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**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

### Office Action Summary

**Application No.**

10/533,615

**Applicant(s)**

MURRAY, R. CHARLES

**Examiner**

Devin Salmon

**Art Unit**

3782

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 17 February 2009.  
2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.  
3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-24 is/are pending in the application.  
4a) Of the above claim(s) 8-24 is/are withdrawn from consideration.  
5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.  
6) ☒ Claim(s) 1-8 is/are rejected.  
7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.  
8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.  
10) ☒ The drawing(s) filed on 29 April 2005 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).  
11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
a) ☒ All b) ☐ Some \* c) ☐ None of:  
1. ☐ Certified copies of the priority documents have been received.  
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
3. ☒ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☒ Notice of References Cited (PTO-892)  
2) ☐ Notice of Draftperson's Patent Drawing Review (PTO-948)  
3) ☒ Information Disclosure Statement(s) (PTO-85/86)  
Paper No(s)/Mail Date 6/9/2008, 8/1/2005  
4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date \_\_\_\_\_  
5) ☐ Notice of Inventor's Patent Application  
6) ☐ Other: \_\_\_\_\_

## DETAILED ACTION

### *Election/Restrictions*

1. Applicant's election without traverse of Group I, claim 1-7 in the reply filed on February 17, 2009 is acknowledged.
2. Claims 8-24 are withdrawn from further consideration pursuant to 37 CFR 1.142(b) as being drawn to a nonelected method of forming and filling a flexible pouch, there being no allowable generic or linking claim. Election was made **without** traverse in the reply filed on February 17, 2009.

### *Double Patenting*

3. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thornton*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

4. Claims 1, 2, 3 and 4 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1, 7 and 9 of copending Application No. 11/683133. Although the conflicting claims are not identical, they are not patentably distinct from each other because claims 1, 7, and 9 of the copending application have all the limitations of claims 1, 2, 3, and 4 of the present application.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

5. Claims 1 and 7 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 8 and 9 of copending Application No. 11/551071. Although the conflicting claims are not identical, they are not patentably distinct from each other because claims 1 and 7 of the present application encompass the subject matter of claims 8 and 9 of the copending application.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

### ***Priority***

6. Applicant's claim for the benefit of a prior-filed application under 35 U.S.C. 119(e) or under 35 U.S.C. 120, 121, or 365(c) is acknowledged. Applicant has not complied with one or more conditions for receiving the benefit of an earlier filing date under 35 U.S.C. 119(e) or 120 as follows:

The later-filed application must be an application for a patent for an invention which is also disclosed in the prior application (the parent or original nonprovisional application or provisional application). The disclosure of the invention in the parent application and in the later-filed application must be sufficient to comply with the requirements of the first paragraph of 35 U.S.C. 112. See *Transco Products, Inc. v. Performance Contracting, Inc.*, 38 F.3d 551, 32 USPQ2d 1077 (Fed. Cir. 1994).

7. The disclosure of the prior-filed application, Application No. 60/422,282 filed on 10/30/2002, fails to provide adequate support or enablement in the manner provided by the first paragraph of 35 U.S.C. 112 for one or more claims of this application. The prior-filed application only describes that the second seal is formed across the foam at the top of the liquid which foam has been produced by the use of an ultrasonic sealing apparatus (page 4, lines 3-11). The priority document does not mention that the second seal might be formed across "some of the product" using any sealing technique which does not produce foam in the product contained in the pouch. *Accordingly, claims 1-7 are not entitled to the benefit of the prior application.*

### ***Claim Rejections - 35 USC § 103***

8. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

9. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

10. **Claims 1 and 7** are rejected under 35 U.S.C. 103(a) as being unpatentable over Whiteford (US 3,204,760) in view of Yasuhira (US 2003/0152297).

11. **Regarding claim 1**, Whiteford teaches a flexible pouch for packaging a product comprising: a front panel (12) and a back panel (14) each having an upper edge (18) , with a first upper edge end (18) and a second upper edge end opposite said first upper edge end, and a sealing edge extending from said first upper edge end to said second upper edge end to define the shape of said front panel and said back panel, wherein said front panel and said back panel are joined together along said sealing edges to contain the product; a first closing seal extending along an upper edge of said joined front and back panel, wherein said first closing seal is formed a predetermined length from said open edge; and a second closing seal extending between said first closing seal and said upper edge such that said upper edges of said front panel and said back panel are sealed together (Figures 1 -3;Column 3, lines 60-65) , but fails to disclose that there is no dead space inside the pouch between the product and said first closing seal and that some of the product is trapped between said first closing seal and said second closing seal.

12. However, Yasuhira teaches a packaging bag wherein there is no dead space inside the pouch between the product and said first closing seal and that some of the product is trapped between said first closing seal and said second closing seal (Paragraphs [0011-0014]).

13. It would have been obvious to one of ordinary skill in the art to seal the package of Whiteford in the manner taught in Yasuhira since doing so would minimize the amount of air trapped with the product.

14. **Regarding claim 7**, Whiteford teaches a flexible pouch wherein said front panel and said back panel are joined together by a first seal (20) at low temperature positioned along said sealing edges and a second seal (22) at a higher temperature applied adjacent the first seal and the product (Figure 1, Column 4, lines 32-40).

15. **Claim 2** is rejected under 35 U.S.C. 103(a) as being unpatentable over Whiteford in view of Yasuhira in view of Tang (US 6,610,338).

16. **Regarding claim 2**, Whiteford and Yasuhira disclose a flexible pouch for a product but fail to disclose wherein said product is a carbonated beverage.

17. However, Tang discloses a flexible pouch wherein said product is a carbonated beverage (Column 5, lines 9-28).

18. It would have been obvious to one of ordinary skill in the art that a carbonated beverage could be packaged in the pouch of Whiteford and Yasuhira since Tang teaches that it was known in the art to package a carbonated beverage in a flexible pouch similar to that of Whiteford and Yasuhira.

19. **Claim 3** is rejected under 35 U.S.C. 103(a) as being unpatentable over Whiteford in view of Yasuhira in view of Yoshida (US 4,762,514) and further in view of Steeves (US 4,177,310).

20. **Regarding claim 3**, Whiteford and Yasuhira disclose a flexible pouch as set forth in claim 1 but fail to disclose that said front panel and said back panel are a laminate material including a metalized foil paper layer and a cast polypropylene layer.

21. However, Yoshida teaches a beverage container wherein said front panel and said back panel are a laminate material including an aluminum layer (17) and a cast polypropylene layer (21) (Column 5, lines 1-15).

22. It would have been obvious to one of ordinary skill in the art to create the pouch of Yasuhira and Whiteford from the material taught by Yoshida since doing so would provide the pouch with the light proof properties of the material.

23. Whiteford, Yasuhira, and Youshida fail to disclose that the aluminum layer is a metalized foil paper layer.

24. However, Steeves teaches a metallized foil paper useful in packaging applications (abstract).

25. It would have been obvious to one having ordinary skill in the art at the time the invention was made to use a metallized foil paper in place of the aluminum layer, since it has been held to be within the general skill of a worker in the art to select a known material on the basis of suitability for the intended use as a matter of obvious design choice. In re Leshin, 125 USPQ 416.



26. **Claims 4-6** are rejected under 35 U.S.C. 103(a) as being unpatentable over Whiteford in view of Yasuhira in view of Savage (US 6,607,097).

27. **Regarding claim 4**, Whiteford and Yasuhira disclose a flexible pouch but fail to disclose that the pouch further comprises a fitment disposed in either one of said front panel or said back panel for dispensing the product from the pouch.

28. However, Savage teaches a pouch having a fitment (124) disposed in the front panel (104) for dispensing the product from the pouch.

29. It would have been obvious to one of ordinary skill in the art to add the fitment of Savage to the pouch since doing so would provide a way to reseal the package after a portion of the contents had been removed.

30. **Regarding claim 5**, Whiteford and Yasuhira disclose a flexible pouch but fail to disclose the pouch having a fitment wherein said fitment is a resealable, interlocking closing means.

31. However, the fitment taught by Savage is a resealable, interlocking closing means.

32. It would have been obvious to one of ordinary skill in the art to add the fitment of Savage to the pouch since doing so would provide a way to reseal the package after a portion of the contents had been removed.

33. **Regarding claim 6**, Whiteford and Yasuhira disclose a flexible pouch but fail to disclose the pouch having a fitment wherein said fitment is a screw-on-cap.

34. However, the fitment taught by Savage includes a screw-on cap (140).

35. It would have been obvious to one of ordinary skill in the art to add the fitment of Savage to the pouch since doing so would provide a way to reseal the package after a portion of the contents had been removed.

### ***Conclusion***

36. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Brady (US 3,685,720); Orsini (US 2,928,216); Buchko (US 5,246,720); Bell (US 5,971,613); Beudette (US 6,076,967) .

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Devin Salmon whose telephone number is (571)270-7111. The examiner can normally be reached on Monday thru Thursday, 9:30 A.M. to 5:30 P.M. EST.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Nathan Newhouse can be reached on (571)272-4544. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic

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Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Devin Salmon/  
Examiner, Art Unit 3782

/Justin M Larson/  
Examiner, Art Unit 3782